

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-6070 76-6080

In The
United States Court of Appeals
For the Second Circuit

JOSEPH C. WEBER, INC.,
Plaintiff-Appellee-Cross-Appellant,

v.

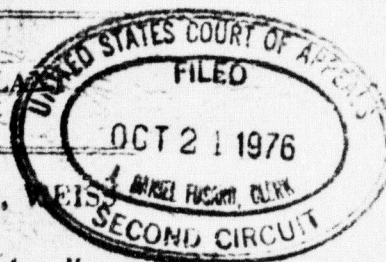
UNITED STATES OF AMERICA,
Defendant-Appellant-Cross-Appellee.

On Appeals From The Judgment Of The United States
District Court For The Western District Of New York

BRIEF FOR
PLAINTIFF-APPELLEE-CROSS-APPELLANT
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 76-6070 and 76-6080

JOSEPH C. WEBER, INC.,

Plaintiff-Appellee-Cross-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant-Cross-Appellee.

ON APPEALS FROM THE JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE-CROSS-APPELLANT
JOSEPH C. WEBER, INC.

STATEMENT OF THE ISSUES PRESENTED

Since this brief is submitted in behalf of plaintiff in its role as cross-appellant, as well as in its role as appellee, we shall separately state the issues involved in the appeals.

Issues involved in plaintiff's cross appeal

1. Was it error for the Court to permit the Government to repudiate a written stipulation of basic facts and to further allow the Government to present evidence inconsistent with the facts as stipulated?

2. Was the plaintiff-cross-appellant entitled to a direction of verdict on the basis of the stipulation and the evidence presented?

Issue involved in defendant's appeal

Was there any evidence upon which an inference could be based to support the jury's verdict?

FACTS

The plaintiff Joseph C. Weber, Inc. is a corporation, 99% of the stock of which is owned by Joseph C. Weber. The other share is owned by Mr. Weber's wife (plaintiff's Exhibits 5, 6, 7). During the taxable years in question, and for many years prior thereto, the company was engaged in the business of selling fuel oil in the Niagara Falls, New York area (defendant's Exhibit 7). The company bought the heating oil which it sold to its retail customers from Mobil Oil Company. Mobil agreed to pay a commission (A26, ¶12) to Mr. Weber personally on the fuel oil which he sold in behalf of Mobil to his company (SA278).^{*} This arrangement was made between Mr. Weber and Mobil some years before the years 1963, 1964 and 1965, the taxable years in question (SA275-278). The commissions were paid to Mr. Weber personally and he duly included such payments in his gross income on his tax returns and paid the resulting tax (A26, ¶14; plaintiff's Exhibits 2, 3, 4).

* "SA" references are to the Supplemental Appendix (buff colored cover).

Under ordinary circumstances we would, in our role as appellee, stress our point that there was ample evidence to uphold the verdict of the jury and to justify the Court's refusal to set aside the verdict and grant judgment for the defendant, notwithstanding the verdict, before discussing our contentions as cross-appellant, but in view of the unusual circumstances of this case we will first present our argument as cross-appellant. In this way we can discuss the case in the same order that the special questions were put to the jury.

POINT I

PLAINTIFF'S ARGUMENT AS CROSS-APPELLANT

The Trial Court should have directed a verdict in favor of the plaintiff on the basis of the stipulated facts.

The Court should have directed a verdict in favor of the plaintiff with respect to the commissions which Mobil Oil Company paid to Mr. Weber.* The stipulation between the parties was conclusive as to the nature of the payments to Mr. Weber. The Court should not have allowed the defendant to repudiate its written stipulation (A24-27)** which reads in part as follows (A26):

"12. The Mobil Oil Company paid a commission directly to Joseph C. Weber, individually, on fuel oil purchased by Joseph C. Weber, Inc., doing business as Weber Oil Company from Mobil Oil Company.

* The plaintiff moved for a directed verdict at the close of the evidence (A157).

** "A" references are to the separately bound appendix prepared by the Government.

"13. During the years in suit, the Mobil Oil Company paid directly to Joseph C. Weber, individually, the following amounts with respect to fuel oil sold by the plaintiff corporation:

| | |
|------|-------------|
| 1963 | \$43,274.10 |
| 1964 | 35,673.47 |
| 1965 | 51,703.17 |

"14. The commissions paid by Mobil Oil Company were not paid to the plaintiff nor reported on the federal income tax returns of the plaintiff, Joseph C. Weber, Inc., but were reported on the income tax returns of Joseph C. Weber, individually, and the tax thereon was paid by him." (Underlining ours.)

Amazingly, this stipulation is not mentioned in Government's statement of the facts. This stipulation was prepared by the Government and presented to plaintiff's counsel who in good faith signed the same. Relying on this stipulation, the plaintiff prepared its case for trial and in doing so, considered the stipulation as conclusive* on the proposition that the payments of Mobil to Mr. Weber were commissions and not something else. As such they were taxable to Mr. Weber who paid the tax thereon, and not to the Weber Oil Company. After the jury had been selected and at the beginning of the trial, the defendant sought to repudiate the stipulation (A28, et seq.). Plaintiff's position on this phase of the case is fully stated at this point in the record.

* See, Henry v. Commissioner, 362 F. 2d 640, 643 (5th Cir. 1966).

Plaintiff and his counsel never conceived that in the light of the stipulation the Government could claim and be allowed to make proof that the commission payments should be considered "rebates" or "special allowances" earned by the Weber Oil Company. The defendant offered no evidence of over-reaching conduct on the part of plaintiff or its counsel in procuring the stipulation, nor could it, because the stipulation was prepared by the Government after a complete investigation and with knowledge of all the facts and signed by plaintiff's counsel at the Government's request.

Importantly, the stipulation was prepared by the Government at a time when it had in its possession plaintiff's claim for a refund which is printed at pp. 12-23 of the appendix. This claim set out in some considerable detail plaintiff's claim with respect to the commissions paid by Mobil Oil to Mr. Weber.

Despite the fact that plaintiff prepared its case in reliance on the stipulation that the payments to Mr. Weber were commissions and not some "special allowance" or "rebate" to the Weber Oil Company and therefore did not subpoena documents pertaining to transactions which took place 12 and 14 years before the trial, when the Court allowed testimony

from defendant inconsistent with the stipulation, plaintiff was able on short notice to produce a Mr. Francis L. Berger who was the "wholesale representative" of Mobil with offices in Buffalo, New York and whose territory encompassed Western New York, including Niagara County.

Mr. Berger's duties comprehended the maintenance of good customer relationships and occasioned him to call on distributors (SA273 et seq.). Mr. Weber was one of the customers with whom he had relations (SA273 et seq.). Mr. Berger testified that during the years in question "it was a buyer's market." That is, it was unlike the present situation. Fuel oil was in large supply. He testified further that there was an abundance of heating oil and the problem on the part of the majors - Esso, Gulf, Texaco, Mobil and the others - was to sell it. He testified that his job was to call on the customers, the distributors, and keep them happy. He further testified that there was a time when he and a Mr. Colla, the then district manager of Mobil, together called on Mr. Weber and had a conversation with him. He said that on this occasion Mr. Cola in his presence asked Mr. Weber if he was happy with the product and was he "happy with the commission" that he was getting. During the course of his

testimony the following then occurred (A170):

"Q. That is, was Mobil Oil paying Mr. Weber a commission?

A. Right.

Q. On the sale of Mobil products to the Weber Oil Company, Inc.?

A. Exactly.

Q. And over the years, did that arrangement continue?

A. Yes."

Even in its brief to this Court and despite the stipulation, the Government characterizes the payments as a "special allowance" (appellant's brief p. 3) and explains this special allowance as something offered by Mobil to meet competitive exigencies (appellant's brief, p. 3), stating:

"When a Mobil distributor, such as the taxpayer, received an offer from a competing supplier, Mobil's representatives would endeavor to substantiate that offer, and, if it was found to be in good faith, Mobil would attempt to meet it through a special allowance to the distributor."
(Appellant's brief, p. 3.)

Nothing could be clearer than that a "special allowance" was a payment entirely separate and different from the commissions paid. As stated in the above quoted excerpts from the Government's brief, special allowances were attempts from time to time to meet certain competitive situations. They were temporary in character and different in amounts from the commissions. The intermittent and temporary character of these allowances appears right on the face of defendant's exhibit 12 at A254-263. There, the few documents pertaining to the allowances are all in the year 1964 and each is entitled "temporary allowance." See defendant exhibit 12, A254-263.

The commissions are not provided for in the 1959 contract between Mobil Oil Company and Mr. Weber's corporation but the arrangement was in existence in the 1950's as appears from the testimony of the witness Francis L. Berger, quoted in its entirety* in our supplemental appendix (SA273-279) filed with this brief, and as appears in the stenographic record at pp. 165-171, and was obviously carried on through the years in question.

As we have pointed out, in the light of the stipulation that the payments were made as commissions to Mr. Weber personally, the Court should not have allowed testimony that the payments were something entirely different. The preamble to the stipulation provides that "either party may introduce other and further evidence not inconsistent with the facts herein stipulated." (A24).

Plaintiff's counsel objected to the evidence offered with respect to some so-called rebates or special allowances and defendant's efforts to change the character of the payments to Mr. Weber (A129 et seq.; 149).

For these reasons without more the District Court should have directed a verdict in favor of the plaintiff.

* His testimony can be read very quickly from our supplemental appendix filed with this brief which the Government failed to reproduce in the appendix prepared by it. For convenience, we have numbered the pages commencing with page SA273 in this supplemental appendix and the "SA" references are to this supplemental appendix.

POINT II

PLAINTIFF'S ARGUMENT AS APPELLEE

There was ample evidence to support the jury's verdict that the payments to Mr. Weber were intended to be compensation and not dividends.

We cannot put the matter more clearly than did the Trial Judge in denying defendant's motion for a judgment, notwithstanding the verdict. The Court said (A270-271):

"The second question presented to the jury read:

"If the answer to question '1' is Joseph C. Weber, Inc. (Weber Oil Company), then answer this question: Were the monies paid intended by Joseph C. Weber, Inc. to be compensation or dividends to Joseph C. Weber as an individual at the time these payments were received by Joseph C. Weber?

COMPENSATION
DIVIDENDS

 X

The Government argues that permitting the jury to answer this question permitted a retroactive adjustment of the compensation paid its officers. However, the stipulation between the parties, the tax returns of the corporation and of Mr. Weber were sufficient to raise a factual question. Considering all of the relationships between the parties, the jury determination was not an unfair one and should not be set aside under Rule 50(b).

"The jury decided, in answer to question '3', that the compensation paid was reasonable. Since the evidence in the case easily supported this conclusion, the answer to this question should not be disturbed."

As the Court stated, the Government argues that permitting the jury to answer this question in the way that it did permitted a retroactive adjustment of the compensation paid to the corporation's officer, and throughout its brief the Government argues that the question to be decided is one of intent. However, at footnote 10 of page 16 of the Government's brief, is the following concession:

"Since Weber was the controlling officer of the corporation, any beliefs and intentions which it had on these subjects would necessarily be those of Weber."

One thing above all others that is crystal clear is that Mr. Weber did not intend the payments to him to be dividends but, quite to the contrary, compensation. The Government's footnote quoted above is in harmony with the law on the subject. See, 5 Fletcher Corporations, § 2099, p. 471 (Perm. ed. 1967).

As stated by Judge Cardozo in Barkin Construction Co. v. Goodman, 221 N.Y. 156, 161 (1917):

"Courts are not to shut their eyes to the realities of business life. Here was a small corporation controlled by a single family. Its business was run without formality (citing cases). None the less it was run, and responsibility must be

"centred somewhere. In the daily conduct of its affairs there was no one except the secretary who assumed to speak for it. If he was not the manager, the company had none. We think the case was for the jury."

In our case Mr. Weber owned 99% of the stock of the Weber Oil Company and his wife owned the remaining share. He ran the company and he spoke for it. In the words of the Government's own footnote, his "intentions" were "necessarily" those of the corporation. The income tax returns of the corporation for the years 1962, 1963, 1964 and 1965 (plaintiff's Exhibits 5, 6, 7) are all consistent with the fact that the money received by Mr. Weber directly from Mobil was regarded and intended as compensation and not dividends. On page 3 of the 1962 and 1963 returns of the Weber Oil Company there is the question put to the taxpayer as to whether the company paid any cash or stock dividend to anyone who held more than 50% of the corporation's voting stock. The answer in each instance is "None".* The form of the returns for 1964 and 1965 omits this question. The point is that this is evidence that plaintiff did not intend that the monies paid to Mr. Weber be regarded as dividends. There is nothing retroactive in his position, as there was in the X-L Service, Inc. case, 32 TCM 701 (1973), relied upon by the Government.

* See plaintiff's Exhibits 5 and 6, page 3 to Form 1120, reproduced in the supplemental appendix at SA280-281.

As observed by the Trial Court in its decision and order denying the defendant's motion for judgment, notwithstanding verdict (A271):

"The Tax Court cases cited by the Government in support of its position are Tax Court cases in which the findings of fact were made by the Tax Court Judge. Here the findings were made by the jury."

Not only is this true but the facts were entirely different in the cited Tax Court cases. For example, in the Paula Construction Co.* case the corporation involved had three stockholders. The president owned 50% of the stock, the vice-president 45% and the secretary 5%. The distributions in question, in the words of the Tax Court, "were distributed in proportion to stockholdings and included one stockholder who performed no services for the corporation." Furthermore, as the Tax Court observed, and more importantly, "each recipient reported the amount received on his individual income tax as a distribution of corporate profits and not a payment of compensation." No wonder the Tax Court found that the distributions did not constitute compensation. In our case beginning before the years 1963, 1964 and 1965 Mr. Weber reported the receipt of the money in question as compensation, using the word "fees" (plaintiff's Exhibits 2, 3, 4). Importantly, the Tax Court indulged in the obvious when it said that the intent involved

* 58 TC 1055, 1059, 1060 (1972).

"is a factual question to be decided on the basis of the particular facts and the circumstances of the case." Under the facts in the Paula Construction Co. case the Tax Court found that the intent was a distribution of profits. In our case on a totally different record the jury found that the monies paid constituted compensation. This is consistent with the tax returns of Mr. Weber who returned the money he received as compensation and paid his tax thereon.

So, also, was the X-L Service, Inc.* case (another Tax Court case relied upon by the Government), a case decided by the Tax Court which made its findings on a totally different record. In that case a man named Billings had a corporation called X-L Service, Inc. The corporation entered into a pooling arrangement with several other purchasers which enabled the corporation to buy its petroleum products at a price which was less than could be obtained on its own. It was specifically understood that the profit resulting from this lesser price was to take the form of "monthly rebates to the members" of the pool. After a dispute arose with the Internal Revenue Service, and we stress the word "after", Billings, the president and owner of the corporation, with only himself in attendance, held a meeting of what he called the directors of the company and passed some self-serving resolutions.

* 32 TCM 701 (1973).

The familiar rule of appellate review of a jury verdict "is whether or not there was sufficient evidence from which the jury could reasonably infer" the result it reached. Armstrong v. Commerce Tankers Corp., 423 F. 2d 957, 958 (2d Cir. 1970), cert. denied, 400 U.S. 833 (1970).

As there is sufficient evidence from which the jury could infer that the sums paid to Mr. Weber by Weber Oil Company were intended to be compensation, the judgment should be affirmed and the Government's motion for judgment n.o.v. was properly denied. Bernardini v. Rederi A/B Saturnus, 512 F. 2d 660, 662 (2d Cir. 1975); Fortunato v. Ford Motor Co., 464 F. 2d 962, 965 (2d Cir. 1972); cert. denied, 409 U.S. 1038 (1972); 5A Moore's Federal Practice ¶50.02 (1975).

CONCLUSION

The judgment of the Court below entered in accordance with the special verdict of the jury in its answers to questions Nos. 2 and 3 should be affirmed, or, in the alternative, plaintiff should have judgment on the basis of the Government's stipulation, notwithstanding the jury's verdict with respect to its answer to question No. 1.

See A264, 265 for the judgment as entered.

Dated: Buffalo, New York
October 18, 1976

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Affidavit of Service

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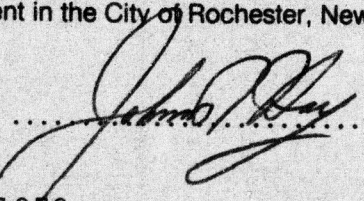
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Plaintiff-Appellee-Cross-Appellant
On October 19, 1976

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